CONFIDENTIAL – DESIGNATED FOR PUBLICATION

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REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **APPLICANT B** A Member of the State Bar.	))))))	**03-S-02904** **OPINION ON REVIEW**

The California Board of Legal Specialization (Board) denied recertification to Applicant B[1] as a specialist in taxation and estate planning in 2003, based in part on applicant's previous disciplinary record.[2] The Board issued a tentative decision to deny re-certification on February 29, 2003, after it reviewed his application, supplemental materials and considered his responses during an oral interview held on May 17, 2002. On June 10, 2003, the Board affirmed its tentative decision after considering additional written information submitted by applicant,

[1]Because this case raises important issues of first impression, we have deemed it appropriate for publication. (Rules of Practice of the State Bar Court, rule 1340(b)(3).) However, all hearings on denial of certification and recertification are confidential unless waived by both parties under rule 15.1 of the Rules Governing the State Bar Program for Certifying Legal Specialists, and applicant has not waived confidentiality. To preserve the confidential nature of these proceedings, we have omitted the identification of applicant by name as well as certain specific facts which might disclose applicant's identity. Unless otherwise expressly stated, all references herein to "rule" or "rules" refer to the Rules Governing the State Bar Program for Certifying Legal Specialists.

[2]In 1998, applicant stipulated to discipline, including 60 days' actual suspension, based on the failure to perform competently in one client matter in violation of the Rules of Professional Conduct, rule 3-110(A), and in another client matter for the failure to keep complete and accurate trust account records in violation of the former Rules of Professional Conduct, rule 8-101(B)(3) and current Rules of Professional Conduct rule 4-100(B)(3).

although rejecting his request for an additional interview. In addition to citing his prior discipline as a basis for denial, the Board denied recertification because of applicant's lack of competence in his specialty areas and his lack of candor on his application form.

Applicant appealed the Board's denial to the Hearing Department pursuant to rule 15.1, and on November 3, 2003, the hearing judge granted the Board's Motion to Dismiss these proceedings for lack of jurisdiction pursuant to rule 15.2. The hearing judge denied applicant's motion for reconsideration of the order dismissing the proceedings on November 24, 2003. Applicant here seeks review of the hearing judge's order of dismissal.

Applicant asserts that the Supreme Court's Order in his previous disciplinary matter, filed in 1998, is void on its face because of numerous constitutional infirmities. Indeed, the vast majority of applicant's brief on review is devoted to legal and factual arguments in support of his effort to re-open his previous stipulated discipline. In spite of applicant's herculean efforts to re-litigate his prior discipline,[3] this court simply does not have the authority to set aside the Order of the Supreme Court, which is final. (Cal. Rules of Court, rule 951; *In re Rose* (2000) 22 Cal.4th 430, 441-442; *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 592; *In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929; *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424, 433, fn. 11.) Once the record in applicant's previous

[3]Applicant filed no less than 18 pleadings in the Hearing Department, the Review Department and the Supreme Court, in support of his effort to set aside the 1998 Stipulation and to re-open his prior disciplinary proceedings. As late as two weeks before oral argument, applicant filed a Brief on Oral Argument, a Motion to Re-open Record and to Present Additional Evidence, and a Joint Application re Stipulated Decision re Dismissal (which was opposed by the Board). We rejected these documents at oral argument as untimely and without good cause shown.

disciplinary cases was transmitted to the Supreme Court, we no longer retained jurisdiction over the matter. (*In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 83, 85.) Thus, we decline to consider those issues raised by applicant as a collateral attack on his prior discipline.

However, applicant raises an important question that is ancillary to, yet independent of, his attack on his prior discipline, which the Board has put at issue in its brief on review. Applicant complains that the Board's actions in considering his application were "designed to avoid meeting with applicant" so that he was denied a reasonable or meaningful opportunity to explain the nature of his prior discipline and the mitigating factors involved. Applicant asserts this resulted in a denial of his due process rights by the Board. In response, the Board asserts that rule 15.2 divests this court of jurisdiction to review *any* decision of the Board to deny certification, as long as the denial is based on a final disciplinary order. Indeed, the Board's corollary position is equally unequivocal: pursuant to rule 15.2, "this Court cannot address any claims of due process violations by the rules governing the legal specialization program, including the [Board's] procedures."

Without question, we have jurisdiction to determine the jurisdictional issue here presented. (*Rescue Army v. Municipal Court* (1946) 28 Cal.2d 460, 464; *Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1228.) Moreover, we frequently consider due process challenges to an attorney's discipline. (See, e.g., *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 500-503; *Rosenthal v. State Bar* (1987) 43 Cal.3d 612, *Emslie v. State Bar* (1974) 11 Cal.3d 210; *In the Matter of Respondent B*, *supra*, 1 Cal. State

Bar Ct. Rptr. 424; *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302; *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 679-680 & fn. 7.) Although we have serious reservations about rule 15.2, which we discuss below, we ultimately agree with the Board that rule 15.2 expressly deprives the State Bar Court of jurisdiction to consider applicant's procedural due process challenge to the decision of the Board denying him recertification.

Rule 15.2 provides in relevant part: "[A] denial, suspension, or revocation [of certification or recertification] by the Board based on a final disciplinary action by the Supreme Court, the State Bar Court, or any body authorized to impose professional discipline, shall be final and shall not be subject to further review."[4]

The legislative history of rule 15.2 makes it abundantly clear that the State Bar proposed the adoption of this rule to the Supreme Court with the specific intent of divesting previously disciplined applicants of their right of appeal to this court.[5] In October 1994, the Office of Certification of the State Bar prepared on behalf of the Board of Governors of the State Bar a detailed document entitled "Request that the Supreme Court of California Adopt Proposed Rule 983.5, California Rules of Court; [Certifying Legal Specialists], and Repeal the State Bar of

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[4]Rule 15.2 also specifies there is no right of review if the Board's denial is based on the failure to pass the legal specialization examination. However, there is no evidence in the record that applicant failed his exams and therefore this issue is not before us.

[5]The implementation of rule 15.2 was part of a complete overhaul of the regulatory scheme for legal specialization, which the Board proposed "to streamline and standardize what had become an overly complex certification process." (17th Annual Report of the California Board of Legal Specialization of the State Bar of California (2004) p. 3.)

California Program for Certifying Legal Specialists, and Memorandum and Supporting Documents in Explanation" ("Request"). In the Request, the State Bar explained the many changes to the legal specialization regulatory structure that would accompany the adoption of the implementing statute, proposed rule 983.5 of the California Rules of Court.

With respect to rule 15.2, the State Bar explained: "Currently, the Rules do not limit an applicant's or specialist's right to appeal a decision of the Board to deny, suspend or revoke [certification] based on a previous discipline. . . . [¶] This amendment is proposed to clarify the longstanding belief of the [Board] that the public expects that *certification as a specialist is not available to a member of the State Bar previously subject to substantial discipline*." (Emphasis added.) (Request, at Enclosure 11, p. 9; see also Request at pp. 15-16.) The Board gave the same explanation of the legislative intent for rule 15.2 in its 8th Annual Report of the California Board of Legal Specialization of the State Bar of California (1995) pages 10-11 ("Report").

Notwithstanding this legislative history, we may properly interpret the absolute language of rule 15.2 in light of existing law. (*In the Matter of Respondent B*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 433, fn. 11.) In so doing, we construe rule 15.2 to mean that the decisions of the Board denying certification or recertification based on a prior final discipline shall not be subject to further review by the State Bar Court, but shall be subject to review by the Supreme Court in accordance with rule 952(d) of the California Rules of Court. We believe this construction of rule 15.2 is dictated by the implementing legislation for the Specialization Program found in California Rules of Court, rule 983.5(f), adopted by the Supreme Court on May 11, 1995, and

effective January 1, 1996, which provides "Nothing in these rules shall be construed as affecting the power of the Supreme Court to exercise its inherent jurisdiction over the practice of law."[6]

Our interpretation of rule 15.2 also is prescribed by the State Bar Act, Business and Professions Code section 6087, which states: "Notwithstanding any other provision of law, the Supreme Court may by rule authorize the State Bar to take any action otherwise reserved to the Supreme Court in any matter arising under [the State Bar Act] or initiated by the Supreme Court; *provided, that any such action by the State Bar shall be reviewable by the Supreme Court* pursuant to such rules as the Supreme Court may prescribe." (Emphasis added.)

Finally, our construction of rule 15.2 is consistent with the decisional law. In *Pinsker v. Pacific Coast Soc. of Orthodontists* (1969) 1 Cal.3d 160, 166 (*Pinsker I*), the Supreme Court held that "an applicant for membership [in a professional organization] has a judicially enforceable right to have his application considered in a manner comporting with the fundamentals of due process . . . ." (See also *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 938 ["when membership in an association is a practical economic necessity, judicial review is available to examine bases for exclusion from membership." (Citations omitted.)]; *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550 (*Pinsker II*) [decision to deny applicant membership in a professional organization must be "both substantively rational and procedurally fair."].)

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[6]The inherent supervisory powers of the Supreme Court have in the past been utilized "to apply procedural rules which will guarantee a 'fair hearing.' [Citation.]" (*Smith v. State Bar* (1985) 38 Cal.3d 525, 532.)

As noted *ante*, we are greatly troubled by the legislative history of rule 15.2 because it discloses that the State Bar's promulgation of the rule was specifically intended to divest applicants, who had been previously disciplined, of their right of appeal based on the Board's "longstanding belief . . . that the public expects that certification" would not be made available to *any* applicant with a prior substantial discipline. (Request at pp. 15-16; Report at pp. 10-11.) The legislative intent of the State Bar in promulgating rule 15.2 is thus directly at odds with our expressed concerns in *In the Matter of Mudge* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 536, 542) about the preclusive effect of a prior discipline on an attorney's right to become certified as a legal specialist in California. At oral argument in *Mudge*, the State Bar took the position that "prior discipline is a 'threshold criterion' for specialist certification." (*Ibid.*) We disagreed with that position, finding that "[n]either the Supreme Court, which retains the inherent authority to regulate attorneys, nor the Legislature has indicated that prior discipline is such a bar. [Citations.]" (*Ibid.*) The preclusion of attorneys from legal specialization based on prior discipline also is at odds with the well settled law in other areas of attorney regulation that favors rehabilitation (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 316), and which permits reinstatement of those individuals with serious prior disciplinary histories, provided they can demonstrate a sufficient passage of time and rehabilitation. (*Ibid.*; see also *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423 and cases cited therein at pp. 437- 438.)

Moreover, an applicant for certification as a legal specialist is entitled to have his or her application decided in accordance with the requirements of the common law right of fair

procedure, and that right includes the "meaningful opportunity to be heard in his own defense. [Citation]" (*In the Matter of Mudge*, *supra*, 2 Cal. State Bar Ct. Rptr. 543-544.) The denial of this right is the very issue presented here by applicant that we are prevented from considering by rule 15.2.

Were it not for the procedural safety net provided by the right of review to the Supreme Court found in California Rules of Court, rule 952(d), the unconditional language of rule 15.2 denying review by this court would in our view constitute an abrogation of applicant's common law right to fair procedure.[7] The right to fair procedure would be an empty one indeed without the opportunity for review, since the Board would be immunized from any challenge to its decision-making process by an applicant with a previous disciplinary history, no matter how remote in time or unrelated to the field of specialization for which certification is sought.[8]

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[7]We further note that rule 15.2 effectively divests applicants with a prior discipline of the many procedural protections available to all other applicants who are challenging the Board's actions with respect to their certification as specialists. For example, rule 15.5 provides for a noticed hearing; rule 15.6 provides for a written Statement of Issues and a written Response, and for good cause, additional witnesses may be called and additional evidence may adduced; rule 15.8 applies the Rules of Procedure of the State Bar; rule 15.9 provides for an appeal of the hearing judge's decision to the Review Department; rule 15.10 provides for review by the Supreme Court. Although not expressly provided, the applicant is not proscribed from representation by counsel in the proceedings in the State Bar Court and the Supreme Court, whereas the right to counsel is expressly denied in the informal and formal oral interviews with the Board. (Rules 9.4 and 9.6.)

[8]We note that applicant's misconduct occurred in 1994, that before that he had practiced without incident for many years, and that the State Bar stipulated in the prior disciplinary proceeding that he had demonstrated candor, remorse, and good faith and had fully cooperated with the investigation and prosecution of the matter. Further, applicant voluntarily paid most of the restitution to his client upon discovery of the loss to his client.

Unfortunately, it appears that applicant did not timely avail himself of the avenue of relief provided to him by California Rules of Court, rule 952(d).[9] Because we have been divested of jurisdiction to review applicant's appeal, we must leave for another day and a timely petition the Supreme Court's consideration of whether rule 15.2 satisfies the due process or fair procedure claims of disciplined attorneys who are denied certification as a legal specialist by the Board because of a prior discipline. As sympathetic as we can be to applicant's claim, we are compelled to agree with the hearing judge below, who correctly dismissed this matter for lack of jurisdiction.

EPSTEIN, J.

We concur:

STOVITZ, P. J.
McELROY, J.*

* Hon. Patrice E. McElroy, Hearing Judge, sitting by designation pursuant to rule 305(e), Rules of Procedure of the State Bar.

[9]Parenthetically, applicant presently may re-apply to the Board for recertification (rule 16.1), and if denied, timely petition the Supreme Court directly.

Case No. 03-S-02904

In the Matter of Applicant B

Hearing Judge

Hon. Robert M. Talcott

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